SINGAPORE REPORTS

Dow Jones Publishing Company (Asia) Inc v Attorney General

COURT OF APPEAL (SINGAPORE) – CIVIL APPEAL NO 51 OF 1988
WEE CHONG JIN CJ, LAI KEW CHAI AND CHAN SEK KEONG JJ
1 JUNE 1989

Administrative Law – Certiorari – Application for – Judicial review – Restriction of circulation of foreign newspaper – Review of Minister's discretionary powers – Scope of judicial review – Natural justice – Duty to act fairly – Whether appellants entitled to right to be heard – Newspaper and Printing Presses Act (Cap 206, 1985 Ed), s 16

Constitutional Law – Freedom of speech and expression – Restriction of circulation of foreign newspaper – Whether s 16 of Newspaper and Printing Presses Act derogates from freedom of speech – Constitutional validity of s 16 of Newspaper and Printing Presses Act – Constitution of the Republic of Singapore, art 14(1)& (2) – Newspaper and Printing Presses Act (Cap 206, 1985 Ed), s 16

Words and Phrases – 'Engaging in the domestic politics of Singapore' – Newspaper and Printing Presses Act (Cap 206, 1985 Ed), s 16

The appellants were the owners of a foreign newspaper circulating in Singapore, the *Asian Wall Street Journal* ('AWSJ'). On 9 February 1987 the Minister of Communications and Information made a declaration that the AWSJ was a foreign newspaper engaging in the domestic politics of Singapore and restricting its circulation under s 16 of the Newspaper and Printing Presses Act (Cap 206). This was done after the AWSJ had declined to publish official replies, in the form submitted, to certain articles which had appeared in the AWSJ. The appellants applied to the High Court for certiorari to quash the Minister's decision, but the applications were dismissed (see *Re Dow Jones Publishing Company (Asia) Inc's Application* [1988] 2 MLJ 414). The appellants appealed to the Court of Appeal. It was claimed that the Minister's decision was flawed because there were insufficient facts to support the exercise of his power, he had not directed himself properly, he took into account irrelevant factors, he acted in breach of his duty to act fairly and he had acted unreasonably in the *Wednesbury* sense.

Held, dismissing the appeal:

(1) Section 16 of the Newspaper and Printing Presses Act (Cap 206) does not require the Minister to be satisfied of the existence of any precedent fact or condition before he can make an order restricting the circulation of a newspaper.

(2) Since the Minister has no formal, procedural or other requirements to be satisfied before he can make the order, any declaration that he makes under s 16 must be deemed to be valid until it is proven otherwise. The burden of proving that the order is unlawful is placed on the party that challenges it.

(3) The Minister's decision under s 16 may be reviewed on the ground of illegality, ie that it is beyond the power conferred by the section. The Minister must act within the scope of s 16(1) when he exercises his power under that section.

(4) The Court of Appeal rejected counsel's submissions that the Minister had invoked the section for an improper purpose, that he had considered irrelevant facts and that his decision was consciously or unconsciously perverse or made in bad faith.

(5) 'Domestic politics' includes the political system of Singapore and the political ideology underpinning it, the public institutions that are a manifestation of the system and the policies of the government of the day that give life to the political system. The domestic politics of Singapore relate to the multitude of issues concerning how Singapore should be governed in the interest and for the welfare of its people.

(6) The Court of Appeal rejected the trial judge's conclusion that the Minister's decision of what amounts to engaging in domestic politics was beyond review by the court.

(7) Reporting or editorial comment which goes beyond what is factual may amount to engaging in domestic politics if it is made with a view to espousing political ideas or causes or seeking to influence public opinion. The espousal need not be confined to political parties; it can extend to non-political pressure groups.

(8) The words 'engaging in' in s 16 have the connotation of 'interfering in' or 'meddling'. The meddling need not be for or against the policies of any political party or the interests of any non-political group in Singapore. It is simply involving oneself in the domestic politics of Singapore where such involvement is neither solicited nor welcomed by those who are concerned with or affected by such matters, ie the people of Singapore. What the expression imports is that the domestic politics of Singapore are for Singaporeans and any attempt by non-Singaporeans to take part in them in any form or manner directly or indirectly is engaging in such politics.

(9) There was on record evidence of the AWSJ having published at least ten articles prior to the one which finally led to the Minister's order under s 16. Each of those articles concerned or touched on the domestic politics of Singapore. The evaluation of whether, on this factual basis, the AWSJ had therefore been engaging in domestic politics in Singapore was a matter for the Minister and not for the courts.

(10) The Court of Appeal was not persuaded that there was any misdirection as to the facts or the law or that the Minister had taken into account any irrelevant facts or that the Minister's conclusion was so absurd that no reasonable or sensible person could have come to the same conclusion. There was therefore no basis for quashing the Minister's decision.

(11) The Court of Appeal rejected counsel's submission that s 16 infringed upon the constitutional right of freedom of speech; art 14 did not apply to the appellants and they had no locus standi to raise the issue.

(12) Similarly, counsel's submissions that the appellants had been treated unfairly and that the punishment was disproportionate were also rejected. Section 16 was also expressed in terms which did not require the Minister to give any publication a right of hearing.

Cases referred to

1 *Council of Civil Service Unions* v *Minister for the Civil Service* [1985] AC 374 (refd)
2 *Secretary of State for Education and Science* v *Tameside Metropolitan BC* [1977] AC 1014 (refd)
3 *R* v *Director of the General Communications Headquarters* The Independent, 21 July 1988 (refd)
4 *Chandler* v *DPP* [1964] AC 763 (refd)
5 *The Queen* v *Secretary of State for Foreign and Commonwealth Affairs, ex p Trawnick* [1986] The Times, February 21 1986 (refd)
6 *Ex p Pirbhai* 29 Sol J 756 (refd)

7 *Puhlhofer* v *Hillingdon London Borough Council* [1986] 1 AC 484 (refd)
8 *Nottinghamshire County Council* v *Secretary of State for Environment* [1986] AC 240 (refd)
9 *South East Asia Fire Bricks* v *Non-Metallic Mineral Products Manufacturing* [1981] AC 363 (folld)
10 *Essex County Council* v *Minister of Housing and Local Government* 66 LGR 23 (refd)
11 *Dowty Boulton Paul* v *Wolverhampton Corp (No 2)* [1976] Ch 13 (refd)
12 *Bromley London Borough Council* v *Greater London Council* [1983] 1 AC 768 (refd)
13 *Chng Suan Tze* v *Minister of Home Affairs* [1989] 1 MLJ 69 (refd)
14 *Congreve* v *Home Office* [1976] QB 629 (refd)
15 *Chesterfield* v *Janssen* (1750) 2 Ves Sr 125; 28 ER 82 (folld)
16 *PP* v *Phua Keng Tong* [1986] 2 MLJ 279 (refd)
17 *Lloyd* v *McMahon* [1987] AC 625 (refd)
18 *Berthelsen* v *Director General of Immigration, Malaysia* [1987] 1 MLJ 134 (distd)
19 *Schmidt* v *Minister of State for Home Affairs* [1969] 2 Ch 149 (refd)

Legislation referred to
Constitution of the Republic of Singapore art 14(1), (2)
Newspaper and Printing Presses Act (Cap 206) s 16

Louis Blom-Cooper QC and *Howard Cashin* for the appellants.
The Attorney General and *Jeffrey Chan* for the respondents.
Cur Adv Vult

Chan Sek Keong J (delivering the judgment of the court): This is an appeal by Dow Jones Publishing Company (Asia) Inc, the owners of the newspaper *The Asian Wall Street Journal* ('AWSJ') against the judgment of Sinnathuray J dismissing an application for two orders of certiorari against two decisions made on 9 February 1987 by the Minister of Communications and Information ('the Minister') (i) declaring the AWSJ a foreign newspaper published in Hong Kong, to be a newspaper 'engaging in the domestic politics of Singapore' pursuant to s 16 of the Newspaper & Printing Presses Act (Cap 206, 1985 Ed) ('NPPA') and (ii) restricting the sale and distribution in Singapore of the said newspaper to 400 copies a day until further notice from its then existing number of about 5000 copies a day.

The factual background to the making of the two orders by the Minister is as follows. On 25 August 1986, Parliament passed Act 22 of 1986 to amend the NPPA by the inclusion of s 18A (which is s 16 in the 1985 revised edition of the Act). This provision empowers the Minister, by order published in the Gazette, to declare any newspaper published outside Singapore to be a newspaper engaging in the domestic politics of Singapore, and upon the publication of such a declaration, (a) no person shall, without the prior approval of the Minister, sell or distribute or import for or possess for sale or distribution any declared foreign newspaper; (b) the Minister may grant his approval subject to such conditions as he may impose or may refuse to grant or revoke such approval without assigning any reason; and (c) the Minister may restrict the sale or distribution of each issue of any declared foreign newspaper granted approval to such number of copies as he thinks fit, and may require such copies to be marked in such manner as he may direct.

The immediate event which culminated in the making of the two orders by the Minister was the publication in the AWSJ of an article on 12-13 December 1986 on its front page bearing the caption 'Singapore Exchange Puzzles Financiers' ('the SESDAQ article'). This was a long article on the establishment by the Stock Exchange of Singapore with the approval and encouragement of the Monetary Authority of Singapore ('MAS') of a secondary stock exchange called the Stock Exchange of Singapore Dealing and Automated Quotation, acronymously 'SESDAQ', to enable small companies in Singapore which need funding in the capital market to list their shares in SESDAQ. On the day of publication, ie 12 December 1986, Koh Beng Seng, a director of MAS, wrote a letter ('the MAS letter') to the editor of AWSJ and complained that the writer of the article, viz Stephen Duthie, had

(1) by the tone of his remarks and choice of words revealed his bias which was also confirmed by errors of fact contained in the article;
(2) implied that the government had pushed for the establishment of SESDAQ independent (ie regardless) of 'the needs and desires of the market place';
(3) contended that 'the government will use the exchange to unload state-controlled and government-backed companies', specifically 'that a company controlled by Temasek Holdings ... was ordered by Temasek to prepare for an immediate listing, even though the concern's merchant banker recommended delaying as much as a year', that this was false because there was no such company;
(4) alleged the new market is to look 'for a way to push along the road' Economic Development Board ('EDB') aided companies in financial difficulties, which was untrue and also not possible since the listing had nothing to do with the government;
(5) criticized the proposed requirement that the lead merchant banker managing a flotation must also be a market maker (both to buy and to sell) in that stock for a year by quoting a worried banker as having remarked: 'as incredible as it may seem, you could go to work one morning holding 1% of a company's shares, and return home that very evening with that company as an associate concern of the bank', that although Duthie then quoted bankers and brokers involved in the planning of SESDAQ dismissing these complaints, he did not state his own position but by repeating the remarks must presumably believe it had some substance.

This letter was sent to the editor of the AWSJ in the expectation that he would publish it in the newspaper. Instead, the editor, FL Zimmerman, replied on 2 January 1987 to say:

(1) the AWSJ had conducted a thorough investigation of the matter and concluded that the article was fair and accurate;
(2) that there were no errors of facts, the AWSJ being satisfied that the company controlled by Temasek Holdings did exist;
(3) that the AWSJ disagreed with Koh's opinion that the tone of the article and the choice of words revealed bias;
(4) that Duthie had worked on the article for over two and a half months and that the result was a measured and appropriate assessment of the subject;
(5) that Koh's comments were an unwarranted attack on Duthie's professionalism;
(6) that the MAS letter contained errors of fact and seriously misrepresented Duthie and his article which he proceeded to identify as follows:
    (a) Koh's statement that the idea of SESDAQ originated in the banking and finance sub-committee of the economic committee, was wrong because the sub-committee in making the recommendation reacted to a widely discussed public issue;
    (b) that Koh's statement that the government had nothing to do with the choice of companies to be listed, etc was wrong because it was AWSJ's understanding that the DBS, although not a merchant bank but which was controlled by the government, was expected to bring more companies to market than any other institution;
    (c) that Koh's claim that it was false to say that the government will use the new exchange to unload state-controlled and government-backed companies was wrong as there was evidence that Mr Chua Soo Tian, director of the Small Enterprise Bureau of the EDB had told bankers that the EDB was financing 1000 companies of which several hundred were eligible for listing;
    (d) that Duthie was neither making allegations, criticisms or contentions in his article but merely repeating what others had said;
    (e) that Koh had used pejorative terms like 'financial difficulties' and 'substandard companies' when Duthie had written of companies that lacked professional assistance and modern management techniques, companies which were not necessarily second-rate or substandard.

Zimmerman concluded his letter by stating that he was not prepared to publish the MAS letter 'for attacking his staff member for unprofessional conduct of which he was not guilty, and alleging errors that do not exist', but that he was willing to publish a letter stating Koh's 'point of view on the subject dealt with in the article'. This letter from Zimmerman drew a reply from Koh on 17 January 1987 in which Koh made the following points:

(a) that it was unusual for a newspaper which habitually champions freedom of speech to refuse to publish views it disagreed with and to allege as a reason therefor that the MAS letter was defamatory;
(b) that the MAS letter was not defamatory of Duthie;
(c) that it was the Singapore Government which had been defamed because Duthie had implied that it will be presiding over the disposal of dud companies, which implication had no factual basis but was based on a complete misrepresentation of the views of Chua of the EDB;
(d) that if the AWSJ had evidence that Temasek Holdings had ordered one of its companies to be listed, the name of the company should be disclosed;
(e) that Duthie's attribution of his scurrilous attacks to a miscellany of anonymosity which did not absolve Duthie or the AWSJ from moral or legal responsibility for reporting and publishing hitherto private views;
(f) that the AWSJ should publish the MAS letter, Zimmerman's reply and this reply for its readers to judge for themselves and that if AWSJ were to refuse, the chairman of the MAS would have no alternative but to draw his own conclusion.

To this letter, Mr Zimmerman replied on 23 January 1987 as follows:

(a) that he regretted that Koh did not accept his offer to write a reasoned statement of his views for publication in the AWSJ;
(b) that the AWSJ had published letters from readers stating various viewpoints and would continue to do so;
(c) that the dispute could have been avoided if Koh had agreed to Duthie's request for an interview at the time he was preparing the article.

In between this exchange of letters between Koh and Zimmerman, the Ministry of Communications and Information had on 15 December 1986 written to the AWSJ forwarding the original of the MAS letter for publication in the AWSJ at the earliest date. On 23 December 1986, the Ministry requested the AWSJ to give its decision whether it would publish the MAS letter. There is no evidence that the AWSJ replied to the Ministry in regard to these two requests. Thus it came about that on 9 February 1987, the Minister made and gazetted the order declaring the AWSJ as a newspaper engaging in the domestic politics of Singapore and also made a second order restricting its circulation in Singapore to 400 copies until further order. To explain its

actions, the government on the same day made a press release in which was set out the events we have summarized above. Since the press release contains two matters which have been relied on by the appellants in support of their appeal, we reproduce below the relevant portions of the press release:

> The action is necessary because the AWSJ has persistently refused to publish a Singapore Government reply to an AWSJ article. The article concerns the proposed second securities market in Singapore, also known as SESDAQ ...
>
> This reply (ie Zimmerman's letter of 23 January 1987) shows that the AWSJ will not allow its readers to read and judge for themselves the Singapore side of an unbalanced story. It proves that the AWSJ is not proud of Mr Zimmerman's specious statement in his two letters to Mr Koh. In fact, Mr Duthie had not got his facts right, and Mr Koh had not defamed Mr Duthie.
>
> It is the Singapore Government which has been defamed by the AWSJ. The AWSJ published Mr Duthie's malicious insinuations that the Government was planning to cheat its own citizens. Mr Koh's letters showed this to be a lie. The AWSJ has refused to publish them.
>
> The Singapore Government therefore has no alternative but to act against the AWSJ.

The next relevant event was the writing on 17 February 1987 of a letter by the Ministry to the President of the International Federation of Newspaper Publishers in Paris. The relevant parts of this letter read:

> This action was taken because the AWSJ has persistently refused to print letters from the Monetary Authority of Singapore (MAS), refuting AWSJ's unfounded and baseless allegations against the Singapore Government in its 12-13 December 1986 issue ...
>
> You will note that it is the AWSJ, and not the Singapore Government, that has censored information by refusing its readers access to the other side of a malicious story. Freedom of expression surely cannot mean giving the media the licence to publish irresponsible and baseless allegations, and then refusing to print corrections.
>
> The AWSJ is not banned, contrary to AWSJ's misrepresentations. It is still circulating in Singapore and is available in some 140 public and other listed libraries. Restricting its sale to 400 copies does not deprive Singaporeans of information. It deprives the AWSJ of sales and advertisement from the other 90% of its previous circulation. Anyone can photocopy them from the 400 copies for their private use.
>
> In the interest of freedom of expression and more importantly, in the interest of truth, you may wish to make available copies of the attached documents to your members so that they too can judge for themselves who is censoring and restricting the flow of information.
>
> Finally, I thank you for your affirmation that Singapore's credibility as an international financial centre is justified. One reason for this credibility is that over the past 29 years, the Singapore Government has never flinched from refuting falsehood and baseless allegations, whatever the source. The government intends to uphold this policy which has provided stable social and political conditions favourable to business.

Then, on 19 February 1987 Prof Tommy Koh, Singapore's Ambassador to the United States, wrote to the Director of Voice of America in reply to a Voice of America editorial broadcast on 11 February 1987 regarding the government's decision. The relevant parts of his letter read:

> This action was taken not because the government took exception to an article appearing in the Asian Journal as you had claimed. It is because the Asian Journal persistently refused to publish the Singapore Government's letters rebutting grave errors of fact and baseless allegations contained in the Asian Journal article. All that the Singapore Government is asking is that where it disputes the facts, it should have the right to have its views published and published in the way it chooses to present them. Surely competition in the market-place of ideas does not mean that only the press has the right to publish what it pleases and the aggrieved party, the Singapore Government, has no right to respond? Exchange of ideas must be a two-way process.

To complete this narration of the relevant events, we refer to one more letter dated 25 February 1987 from the Ministry to the AWSJ, the relevant paragraph of which reads:

> 2 The Minister notes your concern for the convenience of your subscribers in Singapore. He regrets that this concern for your readers did not extend to publishing in toto the correspondence between yourself and Mr Koh Beng Seng of the Monetary Authority of Singapore. Had you done so, all this consequential anxiety would not have been necessary.

On 11 May 1987, the appellants commenced the proceedings under appeal. A number of affidavits have been filed by both parties. For the purpose of this appeal, the two affidavits most relevant are (1) the affidavit of Zimmerman refiled on 20 January 1988 and (2) the affidavit of Tan Guong Ching, one of the two permanent secretaries of the Ministry, filed on 13 April 1988.

In his affidavit, Zimmerman began by giving a brief outline of the AWSJ's role as a business and financial newspaper in this region, stating that the role of its staff correspondents as professional journalists was to report 'on matters of local and international interest or significance, and to investigate and analyse political and economic development of special interest to the AWSJ readership ... without fear or favour, the facts as they believe to be on the basis of their investigations, that the AWSJ itself investigates, and where necessary corrects all material errors in its stories that are brought to its attention, and frequently decides to publish correspondence from persons who complain about its articles.' After referring to the events outlined above, Zimmerman states in para 12:

> My editorial policy in relation to complaints about significant errors or misstatements of fact in articles we have published is to investigate the complaint and, if it is justified, to set the record straight as soon as possible by the

publication of a prominent correction in and on behalf of the newspaper. The investigation of Mr Koh's complaint by my managing editor convinced me that no correction of this kind was warranted. Where a complainant takes issue with opinion expressed by persons quoted in AWSJ articles, or with the tenor of such articles, it is my general policy to consider such contrary opinions for publication as 'letters to the editor', subject to general editorial considerations such as length, tone, absence of malice or misrepresentation or libellous content, etc. It was on this basis that I invited Mr Koh to submit his opinions on the SESDAQ article in a form suitable for publication as a 'letter to the editor'. My editorial policy – of publishing corrections when satisfied of material factual errors, and letters which reasonably express other opinions – maintains the newspaper's credibility with readers and ensures that a diversity of viewpoints is expressed in the AWSJ. Indeed, the AWSJ published in 1986 a total of 14 letters from Singapore Government officials, occupying 13 column inches in the newspaper, only 14 fewer inches than the space devoted to letters from officials of all other governments combined. Any letter from a government source invariably receives serious consideration from myself and my senior staff. However, as explained above, it is my general editorial policy not to publish material which in my view contains misrepresentations, baseless allegations, or defamatory attacks on members of my staff. That editorial policy is applied according to the facts and circumstances of individual cases, and is impervious to threatened reprisals, whether by way of withdrawal of advertising, cancellation of press facilities, banning or restriction of circulation. It is a fundamental condition of a free press that newspapers should be free to decide what they will print without fear of or favour from any external source, and that it is the judgment of the editor and not the dictates of any government which should determine what appears in the newspaper.

Zimmerman then went on to say that some citizens of Singapore have contacted the AWSJ to express their dismay at the interference with their right to receive the information contained in the newspaper by the restriction order limiting the daily number to be distributed in Singapore to 400.

In his affidavit, Tan Guong Ching made the following points:

(a) that the record of AWSJ's actions in relation to its reporting of public and political institutions and of the actions of the Singapore Government did not suggest that the AWSJ under Zimmerman's editorship was a responsible or highly professional newspaper, eg AWSJ had published an article entitled 'Jeyaretnam's Challenge' on 17 October 1985 for which the AWSJ was cited for contempt and had to apologize to the court;

(b) that the AWSJ had published ten articles written by its correspondents between December 1985 and October 1986 which were not only critical of the actions of the Singapore Government and the public institutions of Singapore but also contained errors, omissions and misrepresentations and which appeared to have been designed to portray these bodies and Singapore generally in a negative light to the AWSJ's readers. The titles and nature of these articles were as follows:

Date of Publication	*Title*	*Nature of article*
(1) 23 December 1985	'Singapore's Test'	Comment in the 'Review & Outlook' column
(2) 22 January 1986	'Singapore's Choice'	Comment in the 'Review & Outlook' column
(3) 14/15 February 1986	'Singapore Panel Seeks To Changes To Lift Economy'	Report by Stephen Duthie
(4) 27 May 1986	'Press Bill Doesn't Make Sense For Singapore'	Press statement from the Law Society but represented as a report by Francis T Seow, the President of the society
(5) 5 June 1986	'Judicial Probe In Singapore Ends Hearing'	Report by Stephen Duthie
(6) 4 August 1986	'Singapore Parliament Passes Press Measure'	Report by Stephen Duthie
(7) 15 September 1986	'Singapore's Lee Relishes Clash With Old Enemy'	Report by Stephen Duthie
(8) 16 October 1986	'*Time* Magazine is Restricted By Singapore'	Report by Simon Elegant
(9) 21 October 1986	'Sadness In Singapore'	Comment in the 'Review & Outlook' column.
(10) 12 November 1986	'Jeyaretnam Is Sent To Prison In Singapore'	Report by Stephen Duthie

(c) that the government took the view that by reason of the said reports, the AWSJ was engaging in the domestic politics of Singapore;

(d) that Act 22 of 1986 was passed by Parliament to empower the government to take action against foreign newspapers engaging in the domestic politics of Singapore;

(e) that s 16 had been invoked against *Time* magazine on 15 October 1986 after the said magazine refused to publish a reply from the government to correct several errors in an article published in the magazine in its 8 September 1986 issue; that the reason given by the government for invoking s 16 against *Time* magazine as contained in the government's press statement

released on the same day was that the government was of the view that persistent refusal to correct errors in an article was an example of bias;

(f) that on 23 September 1986, a meeting was held in Singapore between the government (represented by the Minister of State for Communications and Information and BG Lee Hsien Loong, Ag Minister for Trade and Industry) and the Wall Street Journal and the AWSJ (represented by Peter Kann, executive vice-president of the Wall Street Journal, Edward-Cony, president of the appellants, Barry Wain, managing editor, AWSJ, and Zimmerman) at which the Minister of State after referring to the slanted reporting by the AWSJ against the government expressed the government's concern over the past few years had informed the newspapermen that the government might have to invoke s 16 of the NPPA against the AWSJ to restrict its circulation in Singapore;

(g) that the AWSJ was aware of the government's concern over foreign publications engaging in the domestic politics of Singapore, the reasons behind the enactment of s 16, the circumstances which would cause the government to invoke its powers under that section, and the political will of the government to act accordingly, and in particular that if it continued to seek to portray the government in the way it had done, the government would invoke s 16;

(h) that notwithstanding the aforesaid knowledge, published the SESDAQ article which in the government's view constituted another instance of the AWSJ engaging in the domestic politics of Singapore as the main point the article sought to make was that the government deliberately set up SESDAQ to cheat potential investors and the public of Singapore;

(i) that although Zimmerman had stated that the SESDAQ article was carefully researched, nowhere in the article had Duthie identified any of the sources from whom or where he derived the information for his article;

(j) that Duthie had been invited to a press conference held by the SESDAQ working committee on 11 December 1986, the day before the SESDAQ article appeared, but failed to attend, thus demonstrating either his lack of interest in the views of SESDAQ or AWSJ's decision to publish the article as written without the need to consider if further facts, explanations or clarifications needed to be considered;

(k) that notwithstanding the gravity of the innuendo in the article, the initial choice of response of the government was to request the AWSJ to publish the MAS letter to put right the errors and misrepresentations in the SESDAQ article;

(l) that from the totality of the circumstances, the tenor of the SESDAQ article as well as the persistent refusal by the AWSJ to publish the MAS letter, the government had concluded that the AWSJ had deliberately refused to mitigate or correct the initial effect of the SESDAQ article on its readers or allow its readers to read the government's responses to the allegations therein and that by this course of conduct, the AWSJ was engaging in the domestic politics of Singapore, thus giving the government sufficient reason to invoke s 16 of the NPPA against the AWSJ.

On the basis of the matters we have summarised, counsel for the appellants, Mr Blom-Cooper QC, advanced the following arguments before Sinnathuray J:

(1) the two orders of the Minister, being made in the exercise of his discretionary powers under s 16 of the NPPA and affecting individual rights, were subject to judicial review on *GCHQ*[1] grounds;

(2) the Minister's decision was flawed in five respects:

(a) no facts existed so as to attract the statutory power, ie there was no evidence that the AWSJ had at any time engaged in domestic politics;

(b) if facts did exist, the Minister had not properly directed himself in law;

(c) the Minister took into account irrelevant factors;

(d) in arriving at his decision, the Minister was in breach of his duty to act fairly;

(e) the Minister had in any event acted unreasonably in the *Wednesbury* sense;

(3) the restriction order was in breach of the principle of proportionality.

Sinnathuray J rejected all these arguments and held as follows:

(1) the decision, whether a foreign newspaper was or was not engaging in the domestic politics of Singapore, was for the Minister to make and not for the court to decide unless it could be shown on the facts that the Minister has exercised his power in bad faith or has acted irrationally or unreasonably in the *Wednesbury* sense;

(2) there were ample facts to attract the statutory powers given to the Minister under s 16 of the Act;

(3) the Minister had taken into account only relevant facts, and had not considered any irrelevant matters;

(4) in the decision-making process, the Minister had, at all times, acted fairly and had afforded the AWSJ every opportunity to rectify the grave errors, in the scathing attack in the article on SESDAQ;

(5) there was no evidence that the Minister had in any way acted unreasonably;

(6) the principle of proportionality was not established as a principle of administrative law in England.

In this appeal, Mr Blom-Cooper restates the submissions he made to Sinnathuray J.

As the substance of this appeal turns primarily on the scope of s 16 of the NPPA, it is convenient at this juncture to take a look at that provision before we consid-

er the submissions of counsel for the appellants and of the Attorney General. Section 16 which came into force on 1 September 1986 provides as follows:

> (1) The Minister may, by order published in the Gazette, declare any newspaper published outside Singapore to be a newspaper engaging in the domestic politics of Singapore.
> (2) No person shall, without the prior approval of the Minister, sell or distribute or import for or possess for sale or distribution any declared foreign newspaper.
> (3) The Minister may grant his approval under subsection (2) subject to such conditions as he may impose or may refuse to grant or revoke such approval without assigning any reason.
> (4) The Minister may restrict the sale or distribution of each issue of any declared foreign newspaper granted approval under subsection (2) to such number of copies as he thinks fit, and may require such copies to be marked in such manner as he may direct.
> (5) Any person who contravenes subsection (2) or fails to comply with the conditions imposed under subsection (3) or who sells or distributes any copy of a declared foreign newspaper which is not marked in accordance with subsection (4) shall be guilty of an offence and shall be liable on conviction to a fine not exceeding $10,000 or to imprisonment for a term not exceeding 2 years or to both.
> (6) In any proceedings under this section it shall be presumed, until the contrary is proved, that any person found in possession of more than 5 copies of the same issue of a declared foreign newspaper had possession of them for sale or distribution.

The section is expressed in terms which empowers, simpliciter, the Minister to declare a foreign newspaper as engaging in the domestic politics of Singapore. It does not expressly require him to be personally satisfied, whether subjectively or objectively, of the existence of any precedent fact or condition before he can make the order. Nor does it require him to hear the foreign newspaper before or to give reasons after the making of his decision thereunder. No authority directly in point has been cited to us which has decided or discussed a discretionary power in such statutory form. In our view, since the Minister has no formal, procedural or other requirements to be satisfied before he can make the order, it must follow that any declaration that he makes under s 16 must be deemed to be valid until it is proved otherwise by any foreign newspaper aggrieved by his decision. The maxim *omnia praesumuntur rite esse acta* would apply to the making of such an order upon its being gazetted. The gazetting of the Minister's order ipso facto presumes its legality. It has the effect of placing the burden of proving that the order is unlawful on any aggrieved foreign newspaper which challenges it. We do not think that there can be an issue on the effect of s 16 as regards the burden of proof.

We now turn to Mr Blom-Cooper's submissions. His first general submission is that the first finding of Sinnathuray J is wrong on the ground that any decision of the Minister made under s 16 of the NPPA is subject to judicial review on all the *GCHQ*[1] grounds (ie as classified by Lord Diplock in his judgment in the *GCHQ* case, viz *Council of Civil Service Union* v *Minister for the Civil Service*[1] including 'illegality' as explained therein. It is submitted that in this sense, the Minister must not act outside the scope of s 16 (ultra vires) and must not also misdirect himself on the law that regulates his decision-making power. Counsel refers to certain passages in the judgments of the House of Lords in the *Tameside*[2] and *GCHQ* cases which we reproduce below. In *Tameside*,[2] Lord Wilberforce said (at p 1047):

> (2) The section is framed in a 'subjective' form – if the Secretary of State 'is satisfied.' This form of section is quite well known, and at first sight might seem to exclude judicial review. Sections in this form may, no doubt, exclude judicial review on what is or has become a matter of pure judgment. But I do not think that they go further than that. If a judgment requires, before it can be made, the existence of some facts, then, although the evaluation of those facts is for the Secretary of State alone, the court must inquire whether those facts exist, and have been taken into account, whether the judgment has been made upon a proper self-direction as to those facts, whether the judgment has not been made upon other facts which ought not to have been taken into account. If these requirements are not met, then the exercise of judgment, however bona fide it may be, becomes capable of challenge: see *Secretary of State for Employment* v *ASLEF (No 2)* 2 QB 455, per Lord Denning MR, at p 493.
>
> (3) The section has to be considered within the structure of the Act. In many statutes a minister or other authority is given a discretionary power and in these cases the court's power to review any exercise of the discretion, though still real, is limited. In these cases it is said that the courts cannot substitute their opinion for that of the minister: *they can interfere on such grounds as that the minister has acted right outside his powers or outside the purpose of the Act, or unfairly, or upon an incorrect basis of fact.* But there is no universal rule as to the principles on which the exercise of a discretion may be reviewed: each statute or type of statute must be individually looked at. (Emphasis added)

In the *GCHQ* case[1] Lord Diplock delivered what is now considered as the classic statement on judicial review; his Lordship said (at pp 410-411):

> Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By 'illegality' as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By 'irrationality' I mean what can by now be succinctly referred to as '*Wednesbury* unreasonableness' (*Associated Provincial Picture Houses Ltd* v *Wednesbury Corporation* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer or else there would be something badly wrong with our judicial system.

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

The learned Attorney General in reply to this submission contends that there are certain established categories of cases in which the exercise of executive discretionary powers is not subject to review except on the ground of bad faith or perversity. He refers to the following cases: (1) the *GCHQ* case;[1] (2) *R* v *Director of the General Communications Headquarter, ex p Hodge*;[3] (3) *Chandler* v *DPP*;[4] (4) *The Queen* v *Secretary of State for Foreign and Commonwealth Affairs, ex p Trawnik*;[5] (5) *Ex p Pirbhai*;[6] (6) *Puhlhofer* v *Hillingdon London Borough Council*,[7] (7) *Nottinghamshire County Council* v *Secretary of State for Environment*,[8] (8) *South East Asia Fire Bricks* v *Non-Metallic Mineral Products Manufacturing Employees Union*;[9] (9) *Essex County Council* v *Minister of Housing and Local Government*;[10] (10) *Dowty Boulton Paul* v *Wolverhampton Corp (No 2)*;[11] (11) *Bromley London Borough Council* v *Greater London Council*.[12]

In our view, none of these cases negates Mr Blom-Cooper's submission that 'illegality' is a ground of review in addition to those accepted by Sinnathuray J. In each of these cases, the principle that the decision-maker must act within the scope of his statutory power was not in doubt. The so-called established categories of cases referred to by the Attorney General affect only the scope of judicial review. For example, in cases involving the exercise of executive powers in the interest of national security (ie cases Nos (1), (2) and (3)) or of international relations (ie Nos (4) and (5)), the courts, once satisfied that such interest is proved to exist, will not review such decisions on the ground of irrationality or unreasonableness in the *Wednesbury* sense or breach of natural justice nor will the courts substitute their opinion for that of the executive. In the words of Lord Scarman in the *GCHQ* case, 'There is no abdication of the judicial function, but there is a common sense limitation recognised by the judges as to what is justiciable (at p 407).

The *Nottinghamshire County Council* case[8] does not establish a category on the same footing as the national security and international relations cases. In that case, certain financial guidelines were issued by the Secretary of State to local authorities under the Local Government Planning and Law Act 1980 as amended by the Local Government Finance Act 1982, which guidelines had been approved by the House of Commons as part of the statutory procedure. The Nottinghamshire County Council sought orders of certiorari to quash the guidelines on the ground of unreasonableness and for declaration that the expenditure guidance was invalid and contrary to law. The House of Lords refused to intervene, holding that the guidelines were valid and that in the absence of bad faith or improper motive, it was inappropriate for the courts to intervene on the ground of unreasonableness. Lord Scarman, in his speech, said (at pp 247-251):

> The submission raises an important question as to the limits of judicial review. We are in the field of public financial administration and we are being asked to review the exercise by the Secretary of State of an administrative discretion which inevitably requires a political judgment on his part and which cannot lead to action by him against a local authority unless that action is first approved by the House of Commons.
>
> ... My Lords, I think that the courts below were absolutely right to decline the invitation to intervene. I can understand that there may well arise a justiciable issue as to the true construction of the words of the statute and that, if the Secretary of State has issued guidance which fails to comply with the requirement of sub-s (11A) of s 59 of the Act of 1980 the guidance can be quashed. But I cannot accept that it is constitutionally appropriate, save in very exceptional circumstances, for the courts to intervene on the ground of 'unreasonableness' to quash guidance framed by the Secretary of State and by necessary implication approved by the House of Commons, the guidance being concerned with the limits of public expenditure by local authorities and the incidence of the tax burden as between taxpayers and ratepayers.
>
> Unless and until a statute provides otherwise, or it is established that the Secretary of State has abused his power, these are matters of political judgment for him and for the House of Commons. They are not for the judges or your Lordships' House in its judicial capacity.
>
> For myself, I refuse in this case to examine the detail of the guidance or its consequences. My reasons are these. Such an examination by a court would be justified only if a prima facie case were to be shown for holding that the Secretary of State had acted in bad faith, or for an improper motive, or that the consequences of his guidance were so absurd that he must have taken leave of his senses. The evidence comes nowhere near establishing any of these propositions.

...And it would be necessary to find as a fact that the House of Commons had been misled: for their approval was necessary and was obtained to the action that he proposed to take to implement the guidance.

... If Parliament legislates, the courts have their interpretative role: they must, if called upon to do so, construe the statute. If a minister exercises a power conferred on him by the legislation, the courts can investigate whether he has abused his power. But if, as in this case, effect cannot be given to the Secretary of State's determination without the consent of the House of Commons and the House of Commons has consented, it is not open to the courts to intervene unless the minister and the House must have misconstrued the statute or the minister has – to put it bluntly – deceived the House. The courts can properly rule that a minister has acted unlawfully if he has erred in law as to the limits of his power even when his action has the approval of the House of Commons, itself acting not legislatively but within the limits set by a statute. But, if a statute, as in this case, requires the House of Commons to approve a minister's decision before he can lawfully enforce it, and if the action proposed complies with the terms of the statute (as your Lordships, I understand, are convinced that it does in the present case), it is not for the judges to say that the action has such unreasonable consequences that the guidance upon which the action is based and of which the House of Commons had notice was perverse and must be set aside. For that is a question of policy for the minister and the Commons, unless there has been bad faith or misconduct by the minister. Where Parliament has legislated that the action to be taken by the Secretary of State must, before it is taken, be approved by the House of Commons, it is no part of the judges' role to declare that the action proposed is unfair, unless it constitutes an abuse of power in the sense which I have explained; for Parliament has enacted that one of its Houses is responsible. Judicial review is a great weapon in the hands of the judges: but the judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficent power.

Puhlhofer[7] also does not establish a special category as it was merely concerned with the meaning of 'accommodation' in the Housing (Homeless) Act 1977 and the House of Lords decided that that was a question of fact for the local authority to decide and that the courts should not intervene save in the exceptional case of a perverse finding, whether made consciously or unconsciously.

Similarly, all the other authorities referred to by the Attorney General have not established any special categories in respect of which the exercise of discretionary power cannot be challenged. Each of them was decided on the scope of the particular power that was exercised.

We do not think that there is an issue here. We are of the view that the Minister's decision under s 16 of the NPPA is subject to judicial review on the ground of illegality in the *GCHQ*[1] sense. The Minister must act within the scope of s 16(1) of the NPPA when he exercises his power thereunder to declare a foreign newspaper in terms of that subsection. As this court has said in *Chng Suan Tze* v *The Minister of Home Affairs*[13] at p 82:

> All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be ultra vires the Act and a court of law must be able to hold it to be so.

In *Nottinghamshire County Council*,[8] Lord Scarman said (at p 249):

> The ground upon which the courts will review the exercise of an administrative discretion by a public officer is abuse of power. Power can be abused in a number of ways: by a mistake of law in misconstruing the limits imposed by statute (or by common law in the case of a common law power) upon the scope of the power; by procedural irregularity by unreasonableness in the *Wednesbury* sense; or by bad faith or an improper motive in its exercise. A valuable, and already 'classical', but certainly not exhaustive analysis of the grounds upon which courts will embark on the judicial review of an administrative power exercised by a public officer is now to be found in Lord Diplock's speech in *Council of Civil Service Unions* v *Minister for the Civil Service*.[1]

Of course, the right to judicial review may, subject to constitutional limits where applicable, be validly taken away by legislation. In the case of *South East Asia Fire Bricks*,[9] the issue was the extent to which the right of review had been taken away by statute. There, the Industrial Relations Act 1967 provided that an award of the Industrial Court constituted thereunder should not be 'quashed' or 'called in question in any court of law'. The issue before the court was whether the High Court had the power, by certiorari, to quash such an award on the ground of an error of law on the face of the award. The Privy Council held that the court's jurisdiction to grant certiorari on that ground had been excluded by the said words but not where the Industrial Court exceeded its jurisdiction; in other words, where the court had made a jurisdictional error as distinguished from a wrong decision within its jurisdiction.

In the case before us, it is common ground that s 16 of the NPPA does not contain any ouster of jurisdiction clause in any form whatever. So not only does the *South East Asia Fire Bricks* case[9] lend no support to the Attorney General's argument on this point, it affords another ground for the conclusion that the court is entitled to review the Minister's decision under s 16 of the NPPA on the classic *GCHQ* grounds, including that of illegality.

We turn now to the specific arguments advanced by Mr Blom-Cooper to impugn the Minister's orders. It is submitted by him that no facts existed so as to attract the statutory power and that the Minister has acted illegally in three respects: (1) the Minister invoked s 16 for an improper purpose in that he would not have made the declaration had the AWSJ published the MAS letter; (2) the Minister took into consideration an irrelevant fact, ie that the AWSJ's refusal to publish the MAS letter

could not conceivably amount to engaging in the domestic politics of Singapore; and (3) the Minister's decision was consciously or unconsciously perverse or made in bad faith; the perversity being the reliance on one ground only for invoking s 16, ie the denial of the right of reply. In substance, the argument is that there is no factual basis to support the Minister's decision.

As to the first point, counsel refers to the decision of *Congreve* v *Home Office*[14] as an illustration of the exercise of a discretionary power for an improper purpose. In that case, upon the introduction of colour television in England, the Home Office demanded an additional payment from each holder of a then current licence for black and white television on pain of cancellation of such licences. The Court of Appeal declared the demand unlawful on two grounds: first, the new regulation increasing the fee had not come into operation and secondly, it was an improper exercise of a discretionary power to use a threat to exercise that power as a means of extracting money which Parliament had given the executive no mandate to demand. Counsel argues that, by analogy, the effect of the press statement, and the subsequent letters showed that what the Minister was doing was seeking to get his right to reply accepted, otherwise he would exercise his power.

We do not accept this argument for three reasons. First, there is not a single word in any of the letters from the MAS or the Ministry to the AWSJ as to what the consequences would be if the AWSJ refused to publish. Even the last letter from the MAS on 17 January 1987 went only as far as stating that the chairman of the MAS would draw his own conclusion if the AWSJ failed to publish. Secondly, it is a non sequitur to argue that because the Minister invoked s 16 against the AWSJ for not publishing the MAS letter, he had thereby threatened the AWSJ with invocation of s 16 if the AWSJ refused to publish. Thirdly, if the AWSJ has been or the Minister is entitled to conclude that the AWSJ has been engaging in the domestic politics of Singapore, then the threat, assuming that there was one, could not have been an unlawful threat as it would be something the Minister was entitled to do under the law.

As to the second and third points, the Attorney General submits that the refusal to publish was merely the catalyst for the Minister's action and not the actual basis on which the Minister acted; that the Minister had before him ample evidence, ie the SESDAQ article and the other articles referred to in Tan Guong Ching's affidavit on which he could and did conclude that the AWSJ was engaging in the domestic politics of Singapore but that the Minister chose not to invoke s 16 until the AWSJ chose to deny the government's request to reply. In any event, it was also submitted that the SESDAQ article and the refusal to publish the reply could itself be sufficient ground to invoke s 16. We agree. Mr Blom-Cooper has chosen to make his submission in this respect very restrictively. In his submission, a refusal to publish a reply could never amount to engaging in domestic politics; there is no right to have a reply published. Of course, if one looks at it as merely a factual refusal to publish a reply, it would be difficult to describe that as engaging in domestic politics. However, one must consider the full facts. The SESDAQ article portrayed a certain image of the government in setting SESDAQ up. If the contents of that article amount to engaging in domestic politics, then a refusal to publish a reply from the authorities to correct the erroneous image portrayed would tantamount to a decision to perpetuate the erroneous image that has been portrayed. In our judgment that would to continue engaging in domestic politics.

Mr Blom-Cooper has made a number of submissions on Tan Guong Ching's affidavit and on the AWSJ articles referred to by him therein. He argues as follows: (a) Tan Guong Ching's has not said that he was making the affidavit on behalf of his Minister and that he stated in para 25 thereof that it was the government and not the Minister which had concluded that there was sufficient reason for s 16 to be invoked against the AWSJ; (b) the reliance by the Minister on the said articles was an evidential afterthought; (c) five of the articles were published before the enactment of s 16 and seven before the meeting of 23 September 1986; (d) all that was stated in the affidavit was that the government did not like the AWSJ articles on public life in Singapore; (e) none of the articles reported or commented on were matters concerning the security of Singapore, friendly relations with other countries, or public order or morality.

These submissions raise the following issues: (1) Tan Guong Ching's affidavit was not admissible to or if admissible did not prove the factual basis on which the Minister acted; (2) the Minister applied s 16 retrospectively by taking into account articles published before s 16 was enacted; (3) reporting and editorial comment by the AWSJ, even with a high degree of scepticism, on the domestic affairs of Singapore, particularly on SESDAQ, was not engaging in the domestic politics of Singapore; (4) the Minister failed to take into account the constitutional freedom of speech and expression guaranteed by art 14 of the Constitution of Singapore before making his declaration; he thereby misdirected himself in law as to the scope of his powers under s 16.

As to the first submission, we are of the view that the criticism against the form and contents of Tan Guong Ching's affidavit is unfounded. He was one of the two permanent secretaries to the Ministry. He was the permanent secretary who signified the Minister's order gazetted on 9 February 1987 under s 16. He has deposed that he had personal knowledge of the matters set out in

his affidavit. The fact that the government has concluded that the AWSJ was engaging in the domestic politics of Singapore does not imply that the Minister himself has not concluded likewise when exercising his power under s 16. Indeed, we might add here that s 16 does not in terms require the Minister to be personally satisfied about anything before he can exercise his power. The s 16 order was made by the Minister and the press statement and two subsequent letters emanated from his Ministry. We have no reason to doubt that Tan Guong Ching had personal knowledge of the matters set out in his affidavit and also his statement regarding the matters the Minister took into account before he made his decision. With regard to the submission that the Minister's reliance on the 10 articles was an evidential afterthought, we would respectfully adopt the view of Lord Fraser of Tullybelton in the *GCHQ* case[1] (at p 402, in answer to a similar submission made in that case by Mr Blom-Cooper) that 'The question is one of evidence'. The evidence of Tan Guong Ching is that his Minister's decision was based on the totality of the circumstances and the tenor of the SESDAQ article as well as the refusal of the AWSJ to publish the MAS letter and the subsequent correspondence between the MAS and the AWSJ so that its readers could judge for themselves, which refusal was, in the view of the government, a deliberate refusal to reduce the initial effect of the SESDAQ article. We have no reason to disbelieve this evidence. We should also point out that this submission regarding the alleged defect in Tan Guong Ching's affidavit was not taken in the court below.

We also cannot accept the argument that the Minister has applied s 16 retrospectively. There is no evidence that he made his order in reliance on the articles published by the AWSJ prior to the enactment of s 16. If he did, there is also evidence that he also relied on articles published after the relevant date. In our view, the issue of retrospectivity is a false issue. The words 'engaging in', (leaving aside their meaning for the moment), are more appropriate to describe a process, rather than an event, although a process must begin with an event. That process may occur over a period of time, be it short or long. The purpose of Tan Guong Ching's affidavit was to demonstrate that since 1985 the AWSJ had published a series of articles which the government had regarded as engaging in the domestic politics of Singapore. The government took the view that these articles followed a consistent pattern of being adverse and slanted against the government and the public institutions of Singapore. In its view, the process of engaging in the domestic politics of Singapore started even before s 16 was enacted. Accordingly, if these pre-s 16 articles did constitute engaging in the domestic politics of Singapore, they could not be irrelevant. If they did not, they would be irrelevant, but it would still not affect the validity of the Minister's decision if he also relied on the post-s 16 articles including the SESDAQ article, and if these articles amounted to engaging in the domestic politics of Singapore.

As to the third issue, whether or not the reporting of these articles including the SESDAQ article amounted to engaging in the domestic politics of Singapore depends on the meaning of that expression. In his judgment, Sinnathuray J said that the expression must be given its natural and ordinary meaning. He accepted as the ordinary meaning of the word 'politics' the definition given in the Oxford English Dictionary ie 'the science and art of government'; he also accepted the definition given by Lord Hardwicke in *Chesterfield* v *Janssen*,[15] ie 'politics comprehends everything that concerns the government of the country'. His Lordship agreed with the Attorney General that what is domestic politics is a question of fact and degree covering 'a broad spectrum ranging from the obvious to the debatable to the just conceivable' (per Lord Brightman in *Puhlhofer's* case[7] at p 518).

Before us, Mr Blom-Cooper has criticised Sinnathuray J's acceptance of Lord Hardwicke's definition in the context of a private contract and that, even if it were given a public element, it was given long before the advent of democratic governments with written constitutions; (2) s 16 did use the word 'politics' instead of 'policies', ie the two are not the same. However, Mr Blom-Cooper has not ventured a firm view on what Parliament intended to comprehend by that expression, except in the context of his constitutionality point which we will consider later. The Attorney General, on the other hand, says that the expression is incapable of legal definition and that Parliament has left it entirely to the Minister to decide, (a contention which we have earlier rejected in connection with the issue of illegality).

In our view, the definition of politics given by Lord Hardwicke is not the less applicable today. A modern dictionary of repute, viz *The Longman Dictionary of the English Language* (1984) gives the following definitions:

> 1a the art or science of government;
> 2 political actions, practices, or policies;
> 3a political affairs or business; specific competition between competing interest groups or individuals for power and leadership in a group, esp a government;
> b political life, esp as a principal activity or profession;
> c political activities characterized by artful and often dishonest practices;
> 4 the political opinions or sympathies of a person or a group;
> 5 the total complex of relations between members of a society; esp the usu conflicting interactions between leaders and led and the influences and controls exerted;
> 6 political science.

In our view, and Mr Blom-Cooper agrees, the expression 'domestic politics of Singapore' has a broad meaning. He

however says that it cannot have the broadest meaning of the public affairs of Singapore as that would render s 16 unconstitutional. We will come to that later. Whatever else that expression may comprehend, it is wide enough, according to the *Longman Dictionary of the English Language* to include political practices or policies. In the context of Singapore, domestic politics would, in our view, include the political system of Singapore and the political ideology underpinning it, the public institutions that are a manifestation of the system and the policies of the government of the day that give life to the political system. In other words, the domestic politics of Singapore relate to the multitude of issues concerning how Singapore should be governed in the interest and for the welfare of its people. In this broad sense, the political, social and economic policies of the government of the day are part and parcel of the domestic politics of Singapore. This is what the learned Attorney General has in mind in his reference to the public institutions of Singapore. On this basis, we have no doubt whatever that to the question whether the SESDAQ article refers to or touches upon the domestic politics of Singapore, the answer is plainly, 'Yes'. The establishment of SESDAQ is part of the government's efforts to encourage entrepreneurship and to widen the securities market in the larger context of promoting Singapore as a financial centre for the region. By the same definition, each of the articles referred to in Tan Guong Ching's affidavit was also concerned with the domestic politics of Singapore.

We consider next the meaning of 'engaging in' in the context of s 16. Mr Blom-Cooper says that this expression means involvement in the electoral processes in Singapore and espousal or editorial support for a political party in Singapore. Sinnathuray J rejected this definition. We also reject it as being unduly narrow. Section 16 does not refer to party politics which is what this submission implies. However, Sinnathuray J was of the view that whether a foreign newspaper was engaging in the domestic politics of Singapore was a matter for the Minister to decide and not for the courts. In his view, Parliament has left it to the Minister to decide what constitutes 'engaging in the domestic politics of Singapore', and the court cannot interfere unless his decision is made in bad faith or he has acted irrationally or unreasonably in the *Wednesbury* sense. With respect, if Parliament has left it to the Minister to decide what is 'engaging in the domestic politics of Singapore', then whatever he decides as such cannot ex hypothesi be ultra vires or irrational or unreasonable nor can it be a decision made in bad faith. It seems to us that the judge's finding on this point amounts to saying that the meaning of the expression 'engaging in', in the context of s 16, is as wide or as narrow as the ipse dixit of the Minister. We do not agree with this conclusion. The ordinary meaning of the phrase 'engage in' [an activity] is to do it or be involved in doing it There are various degrees of involvement in an activity. When used in an Act of Parliament, its meaning would depend primarily on the context in which it is used, taking into account the object of the Act. The role of the court in all cases of statutory construction is to ascertain the intention of Parliament. In regard to s 16 of the NPPA, we are unable to agree that it means what the Minister says it means.

On the other hand, we also do not agree with Mr Blom-Cooper's contention that the expression 'engaging in the domestic politics of Singapore' does not cover reportage or editorial comment on such matters in Singapore. In our view, it depends on the content and purpose of the reportage or the editorial comment. Factual reporting of 'domestic politics' can be said to be not engaging in it. But there is no reason why reporting or editorial comment which goes beyond what is factual may not amount to engaging in domestic politics if it is made with a view to espouse political ideas or causes or seeks to influence public opinion in any direction in respect of such politics. The espousal need not be confined to political parties; it can extend to non-political pressure groups or indeed any group which has an interest in the matter that is being espoused, be it the party in government or the party in opposition. Mr Blom-Cooper has submitted that the word 'meddling' which has been used by the AWSJ in the report published on 8 August 1986 is a perfectly good word to describe 'engaging in'. We agree with him in this respect. In s 16, the words 'engaging in' have the connotation of 'interfering in' or 'meddling'; in other words, involving oneself in affairs with which one has no right to be concerned with. Translated into the domestic politics of Singapore, the meddling need not be for or against the policies of any political party, or the interests of any non-political group in Singapore. It is simply involving oneself in some matter, in this case the domestic politics of Singapore where such involvement is neither solicited nor welcomed by those who are concerned with or affected by such matters, ie the people of Singapore. As an illustration, if the AWSJ were to publish an article or an editorial comment advising or exhorting the people of Singapore on the moral or ethical principles or cultural values that should be accepted or rejected as part of the national ideology of Singapore, it would be wholly appropriate in this regard to describe such activity as engaging in the domestic politics of Singapore. In our view, the fact that the advice is intended to be constructive or otherwise is not relevant. What the expression imports is that the domestic politics of Singapore is for Singaporeans and any attempt by non-Singaporeans to take part in it in any form or manner directly or indirectly is engaging in such politics.

We need to underline this meaning of 'engaging in' in s 16 as Mr Blom-Cooper has put forward certain views

which have blurred the line of demarcation between the role of the domestic press and the role of the foreign press in the reporting or the commenting on of public affairs in Singapore. The first is that the NPPA is a piece of pure domestic legislation and s 16 is merely an amendment to it. This submission is correct to the extent the ambit of the NPPA is limited to regulating the printing and publishing of newspapers within Singapore.

All legislation is domestic in that sense. But this view has obscured the fact that since 1974 the government has amended the NPPA to prohibit any newspaper published in Singapore being managed or controlled by non-citizens so that it could not be used to promote political and other causes or ideas which are not, in the opinion of the government of the day, in the interest of Singapore. Notwithstanding these amendments, the government continued to allow, with a few exceptions, foreign newspapers to be printed and circulated in Singapore by means of exemption orders on a case by case basis. The AWSJ was one of these newspapers. Then in August 1986, s 16 was enacted. The reasons for the enactment of s 16 are public knowledge. The government made known its views that certain foreign newspapers circulating in Singapore had been reporting on issues affecting Singaporeans in such a way as to influence public opinion against the government and the public institutions of Singapore The government took the view, whether rightly or wrongly is not the concern of this court, that these newspapers were engaging in the domestic politics of Singapore and that some means must be found to deter them from continuing to do so. Thus came s 16. The relevant bill was debated in Parliament and the debate was televised. It was also reported in the daily newspapers including the AWSJ. We do not have to refer to Hansard. The AWSJ itself published an article on 4 August 1986 from which we reproduce below the relevant portions thereof:

> Though the issue has stirred uncommon public debate in the last eight months, Singapore's Parliament quickly approved a bill to restrict sales of any foreign publications that are found by the government to be meddling in local affairs ...
>
> Mr Wong [the Minister] told Parliament that 'the vast majority of the 3,000 foreign publications report on Singapore objectively and fairly.' But, he added, 'there has been a tendency on the part of a few foreign publications, a very small minority, which try to stir up Singapore feelings on local issues, even on sensitive issues like race and religion.'
>
> If foreign publications show a pattern of suspect reporting, they are considered to have stepped out of bound of professional journalism into the realm of local politics, Mr Wong said.
>
> He said the three kinds of reports that could cause a communications minister to take action are: articles on local issues found to be 'slanted, distorted or partisan;' articles that attempt to influence Singaporeans on issues that foreigners 'have no business to be involved in,' and articles that 'cast aspersions on our established institutions.' ... Some businessmen and government officials have criticized the measure because it seemingly is at odds with government efforts to fashion Singapore into a regional printing and publishing centre. Singapore already serves as a printing and distribution hub for several foreign publications, including this newspaper, the *International Herald Tribune*, *the Economist*, *Time* and *USA Today*.
>
> Foreign publications could find sales restricted or eliminated simply by the listing of their titles in the government gazette, and under the measure there isn't any apparent avenue to appeal the state's decision.

This court cannot shut its eyes to the mischief that s 16 was intended to prevent. It was a special amendment directed solely against foreign newspapers.

The second view of Mr Blom-Cooper is that it is the function of newspapers in a free society to be critical and even to portray governments in a negative light. That, of course, is the credo of the AWSJ. But, in the present case, the issue before the court is not the role of the press, be it domestic or international, in Singapore. The government has enacted s 16 because it disagreed with the AWSJ on its role as a newspaper in relation to the domestic politics of Singapore. The issue is whether s 16 is wide enough to authorize the Minister to prevent or reduce the ability of the AWSJ from doing just that. If it is, and the Minister has applied the law correctly in this case, the matter ends there, as far as the AWSJ is concerned.

We will now summarize the positions we have reached in this judgment. There is on record evidence of the AWSJ having published at least 10 articles prior to the SESDAQ article, all of which the government says were concerned with or touched upon the domestic politics of Singapore. On the basis of our interpretation of the words 'the domestic politics of Singapore' we agree that each of these articles falls within the ambit of that expression. On this factual basis, the Minister has, on the evidence of one of his permanent secretaries, made the declaration that the AWSJ has been engaging in the domestic politics of Singapore. The evaluation as to whether these articles constituted engaging in the domestic politics of Singapore was matter for the Minister and not for the courts: see Lord Wilberforce in *Tameside*[2] (at p 1047). He or the government may have to exercise his or its judgment as to the intent, direction and effect of these articles on the people directly concerned or affected by the matters dealt with in the articles. We have not been persuaded that there was any misdirection as to the facts or the law or that the Minister has taken into account any irrelevant facts. We are also not persuaded that the Minister's conclusion was so absurd that no reasonable or sensible person could have come to the same conclusion. We are, accordingly, of the view that there is no basis for quashing the decision of the Minister on any of these grounds.

We now turn to the fourth issue raised in Mr Blom-Cooper's submission, ie the Minister misdirected himself as to the scope of his power in failing to have regard to the constitutional freedom of speech and expression guaranteed by art 14(1) of the Constitution of Singapore. To understand this argument, it is necessary to set out art 14(1) & (2) of the Constitution. They provide as follows:

> (1) Subject to clauses (2) and (3) –
> (a) every citizen of Singapore has the right to freedom of speech and expression;
>
> (2) Parliament may by law impose –
> (a) on the rights conferred by clause (1)(a), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;

The argument runs as follows: if the word 'politics' in s 16 is equated to current events in the public life of Singapore, ie public affairs generally, then s 16 per se derogates from the constitutional guarantee of freedom of speech and expression; in order to save it from constitutional invalidity, it is necessary to construe s 16 to limit it to the exceptions permitted by art 14(2)(a); there is nothing in Tan Guong Chin's affidavit to show that the Minister, when considering making the declaration against the AWSJ, saying to himself: 'I must have regard to art 14(2)(a) or I am in grave danger of going outside my powers or behaving unconstitutionally'; accordingly, the Minister has failed to direct himself properly on the law.

It is further submitted by Mr Blom-Cooper that if all the 11 articles published by the AWSJ were examined,' none of them had anything remotely connected with any of the exceptions listed in art 14(2), viz the security of Singapore, friendly relations with other countries, public order or morality. It must therefore follow that none of these articles falls within any rational view of what constitutes engaging in the domestic politics of Singapore, even if the widest possible interpretation were given to that expression in s 16. Therefore, the Minister's decision was irrational.

In our view, Mr Blom-Cooper's submission on or relating to the constitutionality of s 16 is not only inadmissible but is also without substance for the following reasons. First, the appellants are trying to argue indirectly a point which they cannot argue directly, as art 14(1) does not guarantee freedom of speech and expression to them; they have no locus standi on this point. For this reason, the Minister, when invoking s 16 against the AWSJ, did not have to concern himself with the constitutionality of s 16 or the exercise of his power under it. There is no question of his having misdirected himself on the law. Secondly, the argument on misdirection is valid only if the court is able to declare s 16 unconstitutional and this, in our judgment, the court cannot do as the issue is not before the court; thirdly, even if the appellants are entitled in this appeal to raise the constitutionality of s 16 as it indirectly affects citizens of Singapore, it is not so clear, as Mr Blom-Cooper seems to think, that s 16 is an infringement of their constitutional freedom of speech and expression. Mr Blom-Cooper's argument on his point is based on the proposition that freedom of speech and expression includes the right to receive information (in this case from the AWSJ) in order to exercise such freedom. He says that that proposition has been accepted by Thean J in *PP* v *Phua Keng Tong*.[16] In that case, the appellant was convicted of the offence of communicating a document to an unauthorized person under s 5(1) of the Official Secrets Act. It was argued for the appellant that the expression 'documents or information' was so wide that it would contravene art 14(1) of the Constitution unless the said Act was a law enacted for the purposes of the exceptions in art 14(2). To this argument, Thean J said:

> In my opinion *there is no doubt that the right to freedom of expression includes communication or dissemination of information*. There is also no doubt that s 5(1) of the Act does impinge on such right, and the question is whether s 5(1) of the Act or any part thereof falls within the ambit of cl (2) of art 14; cl (3) thereof is not relevant to the present proceedings. It seems to me that the Act is a piece of legislation enacted in the interest of the security of Singapore; and that is a matter expressly listed in art 14(2). (Emphasis added).

Mr Blom-Cooper relies on the words we have underlined. In our view, it is abundantly clear that Thean J in that passage was merely saying that the communication and dissemination of information was an integral part of the freedom of speech and expression. The learned judge said nothing about the receipt of information, which was not relevant to the constitutional argument in that case. Thean J's statement therefore lends no support whatever to Mr Blom-Cooper's argument. Assuming, however, that Mr Blom-Cooper's proposition is valid, again it is not so clear that he would succeed in making it good. We would not wish to say anything that may be construed as prejudging the issue but it needs to be observed that any citizen who is minded to impugn the constitutionality of s 16 in its application to the AWSJ in the present circumstances will need to satisfy the court that in spite of 400 copies of the AWSJ being in daily circulation in Singapore, he has effectively been deprived of the right to receive information from reading the AWSJ. In our view, the constitutional argument has no substance.

We now move to the unfairness point also relied on by Mr Blom-Cooper, ie that the Minister did not act fairly by failing to give an opportunity to the AWSJ to explain or deal with the 10 articles relied upon by the

Minister as they ware dead issues. Counsel for the appellants conceded that on 23 September 1986 at the meeting between the government's representatives and the appellants' representatives the government had given a general warning to the appellants but that that was not sufficient to comply with the NPPA or the duty to act fairly. On his part, the learned judge found that the AWSJ was fully aware of the object of s 16, the concerns of the government over AWSJ's articles before and after the enactment of s 16 and that the Minister had afforded the AWSJ every opportunity to correct the errors in the SESDAQ article. The Attorney General's submission on this point is that firstly, the nature of s 16 is such that the AWSJ has no right to be heard and secondly, if they have, it was unnecessary to give them a hearing as the AWSJ was fully aware of what was going on.

Mr Blom-Cooper has referred us to the principle as restated by Lord Bridge in *Lloyd* v *McMahon*[17] at pp 702-703 as follows:

> My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, domestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness.

In that case, the district auditor, in exercise of his statutory power under s 20 of the Local Government Finance Act 1982, certified the councillors of the Liverpool City Council to be liable for a sum of £106,103 being the amount of a loss incurred or deficiency caused by their wilful misconduct without first giving the man opportunity to make oral representation. Nevertheless, the House of Lords held that in all the circumstances of the case, the facts that the councillors had not requested an oral hearing and that they had been able to make full written representations to the district auditor, the auditor had not acted unfairly in not affording them an oral hearing and they had not been prejudiced by his failure to do so; that they had had adequate notice of the matters on which the auditor had relied in issuing his certificate; and that he and the courts below had been entitled to conclude that the loss of £106,103 had been shown to have been caused by the councillors' wilful misconduct.

Counsel has also referred to the decision of the Supreme Court of Malaysia in *Berthelsen* v *Director General of Immigration, Malaysia*[18] as authority for his argument that the AWSJ was entitled to make representations before the Minister was entitled to act under s 16. In that case, the Director General of Immigration Malaysia cancelled forthwith the employment pass of the appellant who was the staff correspondent of the AWSJ, without giving him an opportunity to make representations. Applying the dicta of Lord Denning in *Schmidt* v *Secretary of State for Home Affairs*,[19] the Supreme Court quashed the order of the Director General, holding that the appellant, having been granted a work permit for a certain period, had a legitimate expectation of being allowed to stay and work in Malaysia for the whole of that period and if his permit were to be revoked prematurely, he ought to be given an opportunity to be heard. The Attorney General contends that *Berthelsen*[18] has no relevance to the instant case as the appellants never had any legitimate expectation that the AWSJ would have an unlimited circulation in Singapore, that any such legitimate expectation was confined to the revocation of their printing licence which was unaffected by the s 16 declaration. We agree with the Attorney General's submission. There is no evidence to show that the government had, at any time after the enactment of s 16, acted towards the AWSJ in any manner under the NPPA which suggested that their daily circulation of 5000 copies in Singapore would not be restricted by a s 16 order without a hearing. Section 16(1) itself is expressed in terms which did not require the Minister to give a hearing to any foreign newspaper found engaging in the domestic politics of Singapore. The AWSJ was clearly aware that there was no right to any prior hearing under s 16.

The appellants have no right but simply a privilege to sell the AWSJ in Singapore. When s 16 was enacted that privilege was liable to be restricted at any time by the Minister acting in accordance with that section. In any event, we do not see any unfairness in nor do we think that the appellants have been prejudiced in any way by the Minister not giving them an opportunity to make representations as (a) they had already been warned by the Minister; (b) they were aware, from the precedent of *Time* magazine being similarly declared for refusing to publish the government's reply, an event reported and commented upon by the AWSJ on 21 October 1986, that the Minister was likely to invoke s 16 upon its refusal to publish the MAS letter and (c) that in respect of the SESDAQ article, the AWSJ was given many opportunities to publish the MAS letter.

The final submission of counsel for the appellants is that the order of the Minister restricting the daily circulation of the AWSJ in Singapore from 5000 copies to 400 copies for an indefinite period is a disproportionate penalty to inflict on the AWSJ on the ground of simply refusing to publish the MAS letter and the ensuing correspondence. Apart from making this submission in general terms, he has not suggested what would have

been a proper restriction, assuming that the doctrine of proportionality applies to a case of this nature. This court has observed in *Chng Suan Tze*[13] that disproportionality as a ground of judicial review contains within it an element of unreasonableness or irrationality. The underlying basis of the restriction order is the need to make it difficult but not impossible for the AWSJ to communicate its unwanted views to its Singaporean readers in Singapore. What is an appropriate restriction is, in our view, purely a matter for the judgment of the Minister. The court has no right to interfere with the Minister's decision in that respect unless it is made in bad faith or perversely. In the instant case, we are not prepared to substitute our judgment for that of the Minister in determining whether the restriction made against the AWSJ is out of proportion to its infractions. The appeal is dismissed. Costs reserved.

Appeal dismissed.

Solicitors: *Murphy & Dunbar.*

Reported by *Terence Tan Bian Chye*

Riedel-de Haen AG v Liew Keng Pang

HIGH COURT (SINGAPORE) – SUIT NO 771 OF 1988
CHAN SEK KEONG J
13 APRIL 1989

Civil Procedure – Interlocutory injunction – Anton Piller order – Order requiring disclosure of names of suppliers and customers of counterfeit goods – Whether order infringed privilege against self-incrimination – UK Copyright Act 1956, s 21 – UK Supreme Court Act 1981, s 72 – Trademarks Act (Cap 332, 1985 Ed), ss 70 & 74 – Consumer Protection (Trade Descriptions and Safety Requirements) Act (Cap 53, 1985 Ed), ss 4 & 14 – Charter of Justice 1826 – Evidence Act (Cap 97, 1985 Ed), ss 2(1), 134(1), (2) & (3) – Indian Evidence Act (Act 2 of 1832), s 32

Evidence – Whether Evidence Act abrogated or qualified privilege against self-incrimination – Whether privilege applicable to affidavits

The plaintiffs obtained an Anton Piller order against the defendant ordering the defendant inter alia to disclose the names of their suppliers and customers of goods bearing the plaintiffs' trademarks. The defendant applied to discharge the order on the ground that it infringed the privilege against self-incrimination.

Held, discharging the order:

(1) Before the privilege against self-incrimination ('the privilege') can be claimed successfully, it must be shown that there is a real risk that incriminating answers would expose the person concerned to arrest or prosecution for any criminal offences.

(2) Since there were two conflicting Malaysian decisions on whether the privilege was relevant to Anton Piller orders, neither of which was binding, it was necessary to consider the issue on first principles.

(3) The privilege was received into Singapore by virtue of the Charter of Justice 1826. In civil proceedings, the privilege extends to the discovery of documents which will tend to incriminate or subject the defendant to a penalty of forfeiture.

(4) The issue whether s 134 of the Evidence Act had abrogated or merely qualified the privilege turns on the meaning of the word 'witness' in sub-s (1). The word in its broad sense would mean a person who has seen a thing or an event or in its narrow sense, a person who goes into the witness box to testify to a fact or thing. The meaning of the word must be determined by the nature of the obligation that is imposed on him by the section.

(5) Subsection (1) referred to an obligation to answer to any matter relevant to the fact in issue. This implies that questions would be put to the witness, which could only be done at a trial.

(6) Subsection (3) requires the court to explain the purport of subsection (2) before compelling a witness to answer a question which will incriminate him. This implied an oral explanation by the judge.

(7) It was not enough to include in the Anton Piller order a statement that the defendant must be informed that the answer given by him in response to the order would not subject him to the risk of arrest or prosecution. (Here, as this was not included in the present Anton Piller order, the order was invalid.) Furthermore, the defendant here did not speak, write or read English.

(8) The adoption of the requirement for the statement was undesirable as it was open to abuse and could lead to disputes as to whether explanations had been given, whether the interpreter was competent to explain and whether the defendant had understood the explanation.

(9) The argument that a person who is compelled by a court order to give evidence is a witness and is therefore not entitled to the privilege, is flawed in that it begs the question, namely, whether at the stage of the proceeding before the court, the defendant was a witness compellable to answer.

(10) In addition, where the Anton Piller order was directed against the defendant, it offended against a fundamental principle of the adverserial system of justice, that the defendant has a right to remain silent and to refuse to defend himself.

(11) Section 2(1) of the Evidence Act provided that Parts I, II and III of the Act did not apply to affidavits presented to the court. Part III of the Act, deals with, inter alia, evidence and witnesses. As the definition of 'evidence' does not include affidavits, it must follow that Part III is concerned with oral evidence only, and s 134 therefore does not apply to affidavits.

(12) Section 134 of the Evidence Act has merely qualified the privilege to the extent that the witness gives oral testimony in judicial proceedings to which the Act is applicable.

Cases referred to

1 *Rank Film Distributors Ltd* v *Video Information Centre* [1981] 2 All ER 76 (folld)
2 *Lincoln International Ltd* v *Eagleton Exports Ltd* [1982] FSR 161 (refd)